United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1342

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- LEONARD DURSO, RICHARD FABELLA, and WILLIAM MORTON, Defendants-Appellants.	Docket No. 75-1342

BRIEF ON BEHALF OF

RICHARD FABELLA,

DEFENDANT-APPELLANT

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CASES CITED

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ISSUES PRESENTED

1. Whether the Court erred in refusing to grant a separate trial and refusing to severe the narcotics charges from the extortion charges.

2. Whether the evidence linking FABELLA to the extortion under Count Four and to the narcotics-conspiracy under Count Eight was insufficient.

3. Whether the admission of the highly prejudicial hearsay by the government witnesses requires a reversal and a new trial.

PRELIMINARY STATEMENT

Appellant, RICHARD FABELLA, appeals from a judgment of the United States District Court for the Eastern District of New York, rendered September 19, 1975 convicting him after a multi-defendant trial, Judge Jacob Mischler presiding, and a jury, of the crime of knowingly, intentionally and unlawfully conspiring to distribute and possess with intent to distribute quantities of cocaine in violation of 21 U.S.C. Sec. 841 (a)(1) and extortion in violation of 18 U.S.C. Sec. 894 (a), for which he was sentenced to five years prison terms on each count to run concurrently.

Appellant, RICHARD FABELLA, is currently at liberty on bail pending appeal.

STATEMENT OF FACTS

During the early winter of 1973, Harry Haralambus, already an informant for the Drug Enforcement Administration (p. 285) and an admitted trafficker in narcotics, met with Appellant, RICHARD FABELLA. At that first meeting, Haralambus was informed by FABELLA that he could make available to Haralambus quantities of cocaine (46-55). Later, Haralambus received a sample from FABELLA.

Haralambus thereafter arranged with others for ultimate distribution. Haralambus met with FABELLA who introduced him to Appellant, LEONARD DURSO. At the meeting among DURSO, FABELLA and Haralambus, DURSO indicated that he would deliver to Haralambus

a quarter pound of cocaine at his cost - $3,000.00, but that DURSO was to receive a profit on the sale thereof by Haralambus of $1,700.00 (60-62).

In March of 1974 Haralambus arranged to purchase a second quarter pound of cocaine for the identical sum of $3,000.00 - this quantity proved of inferior quality, Haralambus returned it to FABELLA who agreed to return it to DURSO (95-96; 683-685).

After a few days, a substitute quarter pound of cocaine was delivered by DURSO to Makides (cousin to Haralambus and one of his pushers) at a Queens motel - FABELLA was present during the transaction (686). Eventually the monies owed on this second transaction were paid less $500.00 but DURSO and Haralambus continued with their deals - DURSO delivered a half pound of cocaine on same terms as previously agreed upon (130-131). As a consequence of this sale, Haralambus paid DURSO $8,000.00 (133). A subsequent supply of 17 ounces of cocaine was delivered to Haralambus who was unable to pay off DURSO in full leaving approximately $5,000.00 still owing to DURSO (148-150).

In July 1974, Haralambus reported this predicament to the Drug Enforcement Administration (155-156).

On instructions of the Drug Enforcement Administration Haralambus attempted to meet with DURSO and tape the conversation with DURSO. However, upon arriving at the Hideaway Bar where he expected to find DURSO, he saw FABELLA instead and spoke to FABELLA requesting FABELLA to take him to DURSO, which FABELLA

did. This conversation with FABELLA was tape-recorded and offered at trial (155, 178-183, 186-190, 195-197, 200).

Later, on September 13, 1974, while Haralambus was at the home of a friend, FABELLA drove DURSO there and when Haralambus came to the door to greet DURSO (FABELLA was standing a foot behind DURSO), DURSO punched him in the jaw. Immediately after the blow, Haralambus accompanied DURSO and FABELLA to a phone booth where Haralambus made a phone call to his cousin, Makides, for more money. Haralambus was then driven back to his friend's home and his injuries required hospitalization and treatment for 10 days. He had suffered a fractured jaw and surgery was performed (220, 228, 372-276, 693-695, 952-959, 978-995, 1004-1009).

POINT I

THE COURT ERRED IN REFUSING TO GRANT APPELLANT FABELLA A SEPARATE TRIAL AND LIKEWISE IN REFUSING TO SEVERE THE NARCOTICS CHARGES FROM THE EXTORTION CHARGES.

Counts One, Two and Three charge LEONARD DURSO with using extortionate means to collect monies from Harry Haralambus. Counts Four and Five charged LEONARD DURSO and RICHARD FABELLA with using extortionate means to attempt to collect an extension of credit from Haralambus and to punish him for the non-payment thereof. Counts Six and Seven charged LEONARD DURSO and WILLIAM MORTON with unlawfully distributing and possessing one-quarter pound of cocaine. Count Eight accused LEONARD DURSO, RICHARD FABELLA, WILLIAM MORTON, CHRISTOPHER WILLIAMS and HARRY HARALAMBUS

of conspiring to distribute quantities of cocaine. The jury found Appellant RICHARD FABELLA guilty of Counts Four and Eight.

It was contended on the argument in support of the motion to severe (a) that RICHARD FABELLA should be tried separately from the others; and (b) certainly, that the extortion and narcotics charges should be tried separately for the reason that the evidence concerning extortion or narcotics could improperly influence the jury to find the Defendant guilty of one charge because of the presence and the proof adduced as to the other, thereby depriving him of a fair trial.

The evidence adduced at the trial concerning the September 13 incident wherein LEONARD DURSO struck Haralambus specifically established that FABELLA said nothing and did nothing at or before the blow struck by DURSO which injured Haralambus (p. 372-375). It is the position of the Appellant FABELLA that the testimony concerning his association with DURSO as testified to by Haralambus led the jury to conclude that his presence at the scene of the assault was presumtively a continuation of support for DURSO.

The testimony regarding the extortion must stand on its own and the conclusion of the jury is against the weight of the evidence and not supported by the testimony describing the assault charged in the fourth Count.

Rule 14, 18 U.S.C.A. states:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information, or

by such joinder, the Court may order an election or separate trials if court grants a severance of defendants or provided whatever other relief justice requires. In ruling on a motion by a defendant for a severance, the law may order the attorney for the government to deliver to the Court for inspection, in camera, any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

In Drew v. U.S., 331 Fed. 2nd 85, on page 86(5) we find:

"It is a principal of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime from which the jury may infer that the defendant committed the crime charged. Since the liklihood that juries will make such an improper inference is high (see Underhill, Criminal Evidence, Sec. 205), Court presumes prejudice and excludes evidence of other crimes unless evidence can be admitted for substantial legitimate purposes."

See also Miller v. U.S.C.A., 410 Fed. 2nd 1290 cert. den. 90 S. Ct. 81 396 U.S. 830; U.S. v. Butler, 494 Fed. 2nd 1246; U.S. v. Gentile, 495 Fed. 2nd 626; U.S. v. DeCesaro, 54 F.R.D. 596.

In U.S. v. Olson, 504, Fed. 2nd 1222, on page 1224 the Court:

"It is uniformly recognized that even though counts are permissibly joined in the same indictment under Rule 8(a), if such joinder would create undue prejudice to an accused during his trial, the Court has the discretion under Rule 14 to order a prosecution election among counts or a severance of counts for trial. Bradley v. U.S., 433 Fed. 2nd 1113; Blunt v. U.S. 404 Fed. 2nd 1283 cert. den. 394 U.S. 909."

POINT II

THE EVIDENCE LINKING FABELLA TO THE EXTORTION UNDER COUNT FOUR AND TO THE NARCOTICS-CONSPIRACY UNDER COUNT EIGHT WAS INSUFFICIENT.

The evidenciary basis which in any way can be deemed to establish the criminal intent in the mind of FABELLA at the "assault" necessarily comes from his past association with DURSO. No where in the record is there any testimony establishing prior knowledge on the part of FABELLA that DURSO intended to assault Haralambus or even that DURSO himself planned to attack Haralambus. As a matter of fact, DURSO testified that he, himself, did not know until the moment that he saw Haralambus that he would strike him and yet the question of FABELLA'S participation as an aider and abettor in this assault was left to the jury. Prima facia there was evidence which warranted submission of this Count to the jury for their deliberation.

The jury was also asked to rely upon the credibility of Haralambus to establish the conspiracy charged in Count 8 of the Indictment. However, the cross-examination of Haralambus clearly established that on several occasions long before the trial, he, Haralambus, had failed to link FABELLA to the conspiracy.

On page 358 we find the following:

"The Court: You may be seated.

"The government concedes that the witness (Haralambus) did not tell the Grand Jury that Mr. Fabella was the one who introduced him to Durso.

"Mr. Monica: Thank you Your Honor."

With reference to the $500.00 that FABELLA allegedly demanded from Haralambos, in contrast to his testimony at the trial relating thereto on page 359 we see:

> "Question: He had discussed with you the fact that he was entitled to some of this money.?
>
> "Answer: Yes. I didn't know, you know, I didn't know exactly how it was, but it turned out that he was suppose to get something. I didn't know if he did anything more or what.
>
> "Did you say that?
>
> "A. Yes, Yes."
>
> See also pages 362 to 365.

As regards the charges in Count Eight, the evidence is equivocal, and in U.S. v. Reina, 242 Fed. 2nd 302, 306, Judge Hand said sales may be evidence of either participation in a conspiracy or random transactions with an independent peddler. The Court there found that the evidence regarding the source of supply was equivocal and, therefore, insufficient for conviction. The Defendant's knowledge of the existence of others and of the conspiracy itself must be clear, not equivocal, and must demonstrate his specific intent to knowingly join the conspiracy. Where conflicting "influences are equally valid, the Defendant is entitled to the one which favors him." - Chavez v. U.S., 275 Fed. 2nd 583.

The above proposition applies to the two crimes charged in the indictment herein.

See also U.S. v. Sperling, 506 Fed. 2nd 1323; U.S. v. DeNoia, 451 Fed. 2nd 979; U.S. v. Aviles, 274 Fed. 2nd 179; Maccio v. U.S., 354 U.S. 913; U.S. v. Ford, 324 Fed. 2nd 950; U.S. v. Cook, 461 Fed. 2nd 906; U.S. v. Braico, 422 Fed. 2nd 543; U.S. v. Skillman, 442 Fed. 2nd 542; U.S. v. Koch, 133 Fed. 2nd 982.

POINT III

THE ADMISSION OF THE HIGHLY PREJUDICIAL HEARSAY DECLARATIONS BY THE GOVERNMENT WITNESSES REQUIRES A REVERSAL AND A NEW TRIAL.

The Court permitted the jury to hear and receive testimony against FABELLA from the lips of Haralambus and Mekides concededly hearsay without first determining whether a conspiracy in fact had come into being and whether FABELLA had become a partner therein. This procedure by the Court flys in the face of Rule 104(a), Federal Rules of Evidence and the Hearsay Rule, thus depriving FABELLA of the rights guaranteed to him under the Fourth Amendment.

The government's case rests upon the genesis of a conspiracy involving FABELLA, DURSO, Haralambus, Mekides, Morton and others allegedly for the purpose of supplying and selling controlled substances. From the outset of Haralambus' testimony, he was permitted to make declarations on the part of the other conspirators which the Court permitted over Appellants' objections and the objections of the other attorneys participating. The Court merely instructed the jury to consider the hearsay declarations of

co-conspirators against FABELLA and the other Appellants only if the jury finds at the conclusion of the case that the conspiracy in fact existed and that FABELLA was a member of the conspiracy and that the statements were made in furtherance thereof (pp. 43-52, 54, 67-68, 73-74, 81-82, 89-90).

Despite the fact that Appellants' counsels specifically asked the Court to determine under Rule 104 whether a sufficient foundation had been established for the receipt of the co-conspirator's hearsay declarations, the Court persisted in its view that this was a jury question upon which it was not required to pass judgment, and in accordance therewith, denied Appellants' timely applications (67-68, 89-90). Under this rule it was improper for the Court to permit the several questioning and prejudicial hearsay declarations to go into the record without the Court having first concluded as a matter of law that a conspiracy had come into being and that the Defendant, FABELLA, and the other defendants against whom the declarations allegedly made in furtherance of that conspiracy had indeed become members thereof. See also Carbo v. U.S., 314 Fed. 2nd 718; U.S. v. Dennis, 183 Fed. 2nd 201 aff'd 341 U.S. 494; Weinstein Federal Rules of Evidence 104/39 104/45 (Mathew Bender 1975).

It is obvious that Judge Mischler dealt with the essential preliminary question as to question of fact rather than of law, which question of fact he left to the jury in violation of Rule 104(a). (See charge 1469-1478)

POINT IV

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT ADOPTS ALL RELEVANT POINTS CONTAINED IN CO-APPELLANTS' BRIEFS.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR IN THE ALTERNATIVE, A NEW TRIAL GRANTED.

Respectfully submitted,

JOSEPH A. MONICA
Attorney for Defendant-Appellant,
RICHARD FABELLA

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

NINA DARAKJIAN being duly sworn, deposes and says: That deponent is not a party to the action, is over 18 years of age and resides at Bronx, New York. That on the 12th day of December, 1975, deponent served the following persons at:

1. RICHARD S. STOLKER, ESQ.
CRIMINAL DIVISION
U. S. DEPT. OF JUSTICE
Washington, D.C. 20530 - (Room 2316)
with seven copies of Appellant Fabella's Brief

2. JEFFREY WEINGARD, ESQ.
ATTORNEY FOR DEFENDANT-APPELLANT,
WILLIAM MORTON
401 Broadway
New York, New York 10013
with two copies of Appellant Fabella's Brief

3. ELLIOT WALES, ESQ.
ATTORNEY FOR DEFENDANT-APPELLANT
LEONARD DURSO
747 Third Avenue
New York, New York 10017
with two copies of Appellant Fabella's Brief

the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States post office department within the State of New York.

Nina Darakjian
NINA DARAKJIAN

Sworn to before me this
12th day of December, 1975.

JOSEPH A. MONICA
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-2748170
Qualified in New York County
Commission Expires March 30, 1977